(8)

FILED
APR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-691

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

MARIE LUCIE JEAN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Lawrence H. Rudnick
STEEL, RUBIN & RUDNICK
936 Public Ledger Bldg.
Philadelphia, PA 19106
(215) 922-1181

Counsel for Amicus Curiae

PACKARD PRESS / LEGAL DIVISION, 1017 L.F.S. BOULEVARD, PHILA., PA. 19103 (215) 893-0000

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATUTES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
The Government should not be permitted to defend against a request for fees under EAJA solely on the basis that its position in the fee litigation was substantially justified	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
American Academy of Pediatrics v. Bowen, 795 F.2d 211 (D.C. Cir. 1986)	8
Cinciarelli v. Reagan, 729 F.2d 801 (D.C. Cir. 1984)	7
Hensley v. Eckerhart, 461 U.S. 424 (1983)	7
Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988)	6
Lee v. Johnson, 801 F.2d 117 (3rd Cir. 1986)	8
McDonald v. Secretary of Health and Human Services, 844 F.2d 1468 (1st Cir. 1989)	7
Pierce v. Underwood, 108 S.Ct. 2451 (1988)	5, 6
Powell v. Commissioner, 891 F.2d 1167 (5th Cir. 1990)	7
Russell v. Heckler, 814 F.2d 148 (3rd Cir. 1987)	7
Sullivan v. Hudson, 109 S.Ct. 2248 (1989)	9
Trichilo v. Secretary of Health & Human Services, 823 F.2d 702 (2d Cir. 1987)	4, 5, 6

Statutes:

28 U.S.C. §2412(d)(2)(D)	3

No. 89-601

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

MARIE LUCIE JEAN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration

of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to evaluate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration, nationality and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, including all district levels of the Executive Office for Immigration Review (hereinafter EOIR), and the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether immigration practitioners will be able to recover attorney's fees in actions brought against the federal government or in defending actions brought by the federal government, is of direct interest to AILA's membership.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from additional legal argument and interpretation with respect to the substantive question of law here at issue.

SUMMARY OF ARGUMENT

The government should not be permitted to defend against an award of fees under EAJA solely on the basis that its position in the fee litigation was substantially justified. The decision of the 11th Circuit Court of Appeals furthered Congressional intent in reducing the deterrent effect of litigating against the federal government. The decision not to permit the defense of substantial justification for the fee litigation is in accord with the statutory language defining the "position of the United States". 28 U.S.C. §2412(d)(2)(D).

The holding of the 11th Circuit Court of Appeals furthers the interest of judicial economy in preventing a second major litigation on the fee issue. The government's position to allow as a defense of substantial justification in the request for fees for litigating the amount of fees both increases the deterrent effect of litigating with the government and creates a second major piece of litigation. Further, it creates the possibility of an "infinite regression" of litigation to determine whether the government's position in the prior litigation was substantially justified.

The government may still object to fee awards on the basis that the claimed number of hours are excessive or the hourly rates are not in accordance with the statute. Further, the government may have available to it certain "technical defenses".

ARGUMENT

THE GOVERNMENT SHOULD NOT BE PERMITTED TO DEFEND AGAINST A REQUEST FOR FEES UNDER EAJA SOLELY ON THE BASIS THAT ITS POSITION IN THE FEE LITIGATION WAS SUBSTANTIALLY JUSTIFIED.

28 U.S.C. §2412(d)(2)(D) defines the position of the United States. This provision was added by the 1985 amendments to make clear Congress' intention that the government's substantial justification defense would be sustained only by showing that the position of the agency which caused the litigation was reasonable and that the government's litigation position was reasonable.

This provision provides strong support for the proposition that Congress did not intend that the government would be able to defend against a request for compensation for the time spent in litigating the fee dispute solely on the basis that its litigation of the fee dispute issue was substantially justified. *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 707-708 (2d Cir. 1987).

The government argues that Congress intended that the fee litigation be treated as a "separate phase of the case". Therefore, the substantial justification defense permitted on the issue of the availability of fees should be permitted with regard to the fee litigation. See Brief for Petitioner, pages 17-18.

It is unlikely that Congress intended such a result. The government's attempt to impute to Congress an intention to create a second major piece of litigation is unavailing. Certainly, it is not supported by the express language of the statute.

The government further argues that Congress established a balance in awarding fees between an automatic fee shifting provision and one which would only allow for fee shifting where the government's position was frivolous. Brief for Petitioner, pages 18-19. This argument ignores that the government had the substantial justification defense available to it in defending the fee petition. Only by artificially bifurcating the proceedings into a separate litigation for fees, is the government able to make this argument. As set forth above, it is unlikely that Congress intended such a result, particularly in light of their definition of the "position of the United States". As the United States Court of Appeals for the Second Circuit stated:

> But since the litigation is no longer the relevant criteria, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the

> victim of the unjustified action is entitled to all reasonable attorneys fees, including those incurred on the fee application.

Trichilo v. Secretary of Health and Human Services, 823 F. 2d 702, 708 (2d Cir. 1987) (citations omitted).

Even more compelling than the statutory language is the effect of the government's position on the stated purpose of the EAJA. Congress expressed the purpose of EAJA as:

> (1) To diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys fees, expert witness fees, and other costs against the United States;

§202 of Pub. Law 96-481, reprinted as a note to 5 U.S.C. §504 in the United States Code Annotated (1989 cummulative annual pocket part).

The effect of the government's position would be to substantially increase the deterrent effect of litigating against the government, precisely contrary to the central purpose of EAJA.

This case, like *Pierce v. Underwood*, 108 S.Ct. 2541, 2549 (1988), involves the exceptional case of litigation involving a substantial amount of fees. Typically, EAJA cases involve much smaller awards. This is particularly so in the immigration context. Most immigration law proceedings are administrative proceedings held before immigration judges and the Immigration Service. These proceedings generally do not involve a sufficient number of hours and hence a sufficient amount of fees to justify extensive litigation as to the amount of fees to be awarded. Permitting the substantial justification defense as to the fee litigation will substantially increase the deterrent effect in representing individuals in small cases.

It should be noted that fees are already capped by the statute at $75 per hour, adjusted for inflation in most cases. *Pierce v. Underwood*, 108 S.Ct. at 2553. Congress has already struck a balance by limiting the hourly rates and permitting the government the defense of substantial justification on the merits. An additional defense permitting the government a second crack at substantial justification would often defeat the purpose of EAJA, to permit an individual of modest means to litigate against the government.

The balance struck by Congress would be substantially disturbed by the government's position. Members of AILA would be significantly deterred from taking on litigation with the government where they know that fees can be recovered not only when the government's position was not substantially justified, but also where the government would be able to drag out fee proceedings and avoid compensating counsel by the defense of substantial justification in the fee litigation.

The facts of *Trichilo v. Secretary of Health and Human Services*, 823 F.2d at 707 are illustrative. In *Trichilo*, the fee applicant requested compensation for 42.1 hours for litigating the case on the merits and 13.1 hours spent in the fee litigation. Were the government to prevail in its argument against the award of compensation for time spent in the fee litigation, the compensation would be reduced by nearly 25 percent. The deterrent effect of this result is evident.

A considerable body of law has developed in the Courts of Appeals finding that the government's ability to raise the substantial justification defense in the fee litigation would substantially undermine the ability of individuals to obtain counsel to litigate against the government. See *Jean v. Nelson*, 863 F.2d 759, 778-780 (11th Cir. 1988); *Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702, 707-708 (2d Cir. 1987);

McDonald v. the Secretary of Health and Human Services, 889 F.2d 1468, 1480 (1st Cir. 1989); and *Powell v. Commissioner of Internal Revenue Service*, 891 F.2d 1167, 1171 (5th Cir. 1990). Thus, there exists a widely held view that the government's position would deter the acceptance by counsel of cases litigating against the federal government, thus undermining the central purpose of EAJA.

There is also the issue of judicial economy to consider. This court has warned on several occasions against the creation of a second major piece of litigation to determine counsel fees. *Pierce v. Underwood*, 108 S.Ct. at 2549, citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1988). The government's position in attempting to create a second major litigation undermines these principles. Refusing to permit the government the substantial justification defense will lead to more prompt resolution of fee applications. Further, it will be an unusual case where the government will be able to establish that its litigation position in defending unreasonable conduct was itself reasonable. *Russell v. Heckler*, 814 F.2d 148, 155 (3rd Cir. 1987) vacated on other grounds, 108 S.Ct. 2891 (1988).

There may be close cases on the question of reasonableness of the government's position on the merits, in which permitting the government the substantial justification defense in the fee litigation could be of significance. More often, it will simply be a waste of judicial resources. Moreover, the government's position permits it to engage in an "infinite regression" of litigation as to substantial justification. See *Cinciarelli v. Reagan*, 729 F.2d 801, 810 (DC Cir. 1984). Although the government disclaims such an intention, Petitioner's Brief at 29-30, the possibility of wearing down the fee claimant by repeated litigation is certainly made available to the government by its position.

The government argues that it would be exposed to excessive and unreasonable attorneys fee claims if it is

stripped of the substantial justification defense as to fees for the fee litigation. This argument ignores the statutory limitation to a "reasonable" fee. The holding of the 11th Circuit Court of Appeals in this case and the decisions of other courts demonstrate the fallacy in the government's argument.

In the matter before the Court, the 11th Circuit Court of Appeals reserved the question as to whether a "technical defense" exception should exist. *Jean v. Nelson*, 863 F.2d at 780 n14. None of the decisions adopting the "automatic fee shifting" rule substantiate the government's claim. To the contrary, all of the decisions limit fee recovery to reasonable fees. The decisions cited above are not inconsistent with the recognition of the "technical defenses" position adopted in *American Academy of Pediatrics v. Bowen*, 795 F.2d 211 (DC Cir. 1986) and apparently adopted in *Russell v. Heckler*, 814 F.2d 148, 145 (3rd Cir. 1987), vacated on other grounds, 108 S.Ct. 2891 (1988). The decisions of the four circuits cited above merely hold that the government does not have available to it the defense of substantial justification as a defense to the claim for fees for litigating the availability and amount of fees.

It should be noted that this case does not raise the issue of the "technical defenses" exception. The government never raised the issue before the Court of Appeals and the facts of the case do not implicate that theory. The government's claim that it would be left defenseless to unreasonable fee petitions because of the absence of the substantial justification defense is without merit.

As well stated by Judge Becker, the result reached by the 11th Circuit "... not only follows from the doctrines surrounding EAJA fee awards, it also makes sense". *Lee v. Johnson*, 801 F.2d 117 (3rd Cir. 1986) (statements sur denial of Petition for Rehearing). The rule suggested by the government is contrary to the

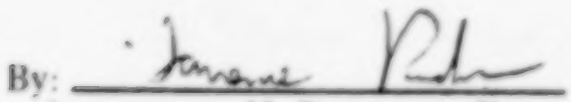
purposes of EAJA and creates another issue which would have to be resolved through another round of litigation. Moreover, the position of the government would often leave litigants against the government with "... a lifeline that was a foot short". *Sullivan v. Hudson*, 109 S.Ct. 2248, 2256 (1989). Congress should not be imputed with an intention to have created a system for fee compensation that leaves a fee litigant substantially deterred from ever accepting the case on the merits.

CONCLUSION

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION urge that the judgment of the United States Court of Appeals for the 11th Circuit be affirmed.

Respectfully submitted,

AMERCIAN IMMIGRATION
LAWYERS ASSOC.

By: 
LAWRENCE H. RUDNICK, ESQ.

CERTIFICATE OF SERVICE

I, Lawrence H. Rudnick, Esquire, do hereby certify that a true and correct copy of the attached Brief Amicus Curiae were served upon the following:

Kenneth W. Starr, Solicitor General, at the Office of the Solicitor General, Washington, DC 20530; and Ira Kurzban, Esq. at Plaza 2650, 2650 S.W. 27th Avenue, 2nd Floor, Miami, FL 33133 by first class mail postage prepaid.

April 5, 1990
DATE

LAWRENCE H. RUDNICK

STEEL, RUBIN & RUDNICK
936 Public Ledger Building
6th & Chestnut Street
Philadelphia, PA 19106